79-871

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

NO. 78-5239

WILLIAM MAYO,

Petitioner,

v

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
FOURTH CIRCUIT COURT OF APPEALS

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TO THE HONORABLE, THE CHIEF AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

William Mayo, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on November 9, 1979.

OPINION BELOW

The Unpublished Opinion of the United States Court of Appeals for the Fourth Circuit affirming the judgment of conviction is attached as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 9, 1979. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

1. Did the Trial Court err in admitting into evidence the results of an audiological examination and the testimony and opinion of expert witnesses based upon this examination when the results had been obtained by compelling the Defendant to be a witness against himself?

2. Did the Trial Court err in admitting into evidence the results of an audiological examination and the testimony and opinion of expert witnesses based upon this examination that consisted of responses that the Defendant had been compelled to give without the opportunity to seek the assistance of counsel?

APPLICABLE CONSTITUTIONAL PROVISIONS

1. UNITED STATES CONSTITUTION, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in

jeopardy of life and limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. UNITED STATES CONSTITUTION, Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

William Mayo was indicted for a violation of 18 U.S.C. Section 287 by a Federal Grand Jury. He was tried and found guilty upon a trial by jury in the United States District Court for the Eastern District of Virginia; Norfolk Division. Jurisdiction was based upon 18 U.S.C. Section 3231. An order of judgment and probation/commitment was entered on the 21st day of August, 1978. Mayo appealed the ruling of the Trial Court to the United States Court of Appeals for the Fourth Circuit, pursuant to 28 U.S.C. Section 1291. This statute allows an appeal as of right from the final decision of the District Court. The decision of the District Court was affirmed by the Court of Appeals by a nonpublished opinion on November 9, 1979. Your Petitioner now seeks a Petition for

Writ of Certiorari and invokes the jurisdiction of the Court under 28 U.S.C. Section 1254.

William Mayo will be referred to as the "Defendant" or "Mayo" hereinafter. The United States of America will be referred to as "the Government" hereinafter. Citations to the trial transcript will be designated by appendix number as they were previously filed and designated with the Court of Appeals.

On April 10, 1978, a grand jury in the United States District Court for the Eastern District of Virginia, Norfolk Division, returned an indictment against the Defendant, William Mayo, alleging that he had filed a false claim for compensation with the United States Department of Labor. On April 19, 1978, the Defendant was arraigned upon the indictment in open court. He entered a

plea of not guilty and requested a trial by jury.

The Defendant filed a pretrial Motion to Quash the Indictment. The issues raised were the questions presented in this petition. The Court received into evidence a proffer by the Assistant United States Attorney, John F. Kane, and considered argument by counsel. The Court overruled the Defendant's Motion to Quash the Indicment and further ruled that it would not suppress the questioned evidence during the Defendant's trial.

The indictment against the Defendant was tried before a jury on June 5, 6, and 7, 1978. At the conclusion of all the evidence, the jury returned a verdict of guilty as to the single count of the indictment.

On August 21, 1978, the United

States District Court Judge entered a final judgment and probation/commitment order against the Defendant. William Mayo was sentenced to a term of five (5) years, and was committed to the custody of the Attorney General for confinement in a jail-type institution for thirty (30) days, with the remainder of his sentence to be suspended. He was placed on five (5) years probation and as a condition of that probation, he was required to pay Two Hundred Dollars ($200.00) per month restitution to the United States Government.

William Mayo has been periodically employed at the Norfolk Naval Shipyard in Portsmouth, Virginia, for a period of time in excess of twenty (20) years. The Norfolk Naval Shipyard is operated by the Department of the Navy. One problem which a long-term employee

at the Shipyard faces is continual exposure to excessive noise. On July 1, 1974, Mayo executed the United States Department of Labor's Form CA-1 and 2. This document was a request for compensation due for a work-related hearing loss. On August 16, 1974, Mayo filed a second claim document designated as CA-4 Form. On September 9, 1974, the Defendant was sent to Dr. Cullen M. McCoy's office by the Shipyard. Dr. McCoy was a civilian ear, nose and throat doctor who was to test Mayo's ability to hear. He filed the results of his examination with the Department of Labor. In 1975 the Department of Labor awarded Mayo a designated amount of compensation.

Over a brief period of years, several thousand Shipyard employees processed hearing loss claims. In 1977 the Justice Department deemed an

investigation into claims for hearing loss awards at the Norfolk Naval Shipyard necessary. Assistant United States Attorney, John F. Kane, was assigned to spearhead the investigation of alleged fraudulent compensation claims at the Shipyard. (App. 33) From July 11th through July 29, 1977, several claims and records were reviewed by an agent of the Naval Investigative Service. (App. 34) Among those was the Defendant's. On July 19, 1977, Mayo's audiological history was directed to the attention of civilian audiologist, Beverly J. Bryant. (App. 34) Ms. Bryant was employed as an expert witness by the Government during the course of this investigation and subsequently testified as an expert witness against Mayo and others charged with like offenses. After her July 19, 1977 review, Ms. Bryant rendered the opinion that

Mayo's claim was of questionable validity and probably fraudulent. (App. 34, L 4-6) She then advised the Naval Investigative Service representative that she could make a more definitive evaluation "as to the character of the subject's hearing loss if she had an additional audiogram evaluation results available for review". (App. 35, L 19-22) Kane was advised of her preliminary findings. He then requested the Shipyard to have Mayo reexamined through a fitness for duty test. (App. 46, L 25; App. 47, L 1)

On August 12, 1977, Mayo received a letter from Harold P. Rogers, Production Superintendent for the Norfolk Naval Shipyard. He was instructed that he was being required to take an audiological examination at the United States Naval Hospital in Portsmouth, Virginia. The

only explanation given for the examination was that it was an evaluation of his physical condition for his own safety. (App. 13) The very same day that the examination was administered, August 17, 1977, the Federal Bureau of Investigation took investigative jurisdiction relating to the Defendant. (App. 41, L 3-6)

Assistant United States Attorney, John F. Kane, conceded that one of two purposes for the examination was to investigate the possibility of criminal prosecution. (App. 42, 43, 45, 46, 50, 51, 52) He candidly stated to the Court that at the time audiological examinations such as the one just described were performed, "the spector of future fraud investigation being fully opened was there". (App. 54, 55; L 9, 10) He even acknowledged that he had considered the necessity of advising potential

defendants of their constitutional rights. (App. 55, L 608) Despite all these concessions by the United States Attorney, the Defendant was merely advised by his employer that he was being evaluated for his personal protection.

The August 17, 1977 audioligical examination consisted of four distinct tests. There was a pure tone examination, a speech reception threshold test, a speech discrimination test, and an impedance audiometry examination.

The pure-tone examination is conducted by playing a tone in the patient's ear. The patient then advises the examiner when he hears the tone by raising his finger or by advising her that he can hear the tone. The examiner records the communicated response on a graph at the decibel level where the patient first hears the tone for each

frequency. (App. 125) The result is a puretone audiogram.

For the speech reception threshold test, the examiner speaks words through a self-modulating microphone. The patient repeats the words that he can hear. The decibel level at which the patient initially repeats a set percentage of the words spoken is the speech reception threshold level. (App. 127) Speech discrimination is determined by the decibel level wherein the examiner and the patient communicate.

The only objective test is an impedance audiometry examination. Air is pumped into the patient's ear and subsequently sucked out. A machine measures the ear's response. The second part of this test consists of inducing a loud noise at the patient's ear which elicits a muscle reflex in the ear. The

decibel level which causes the muscle reflex is then determined by the examiner. (App. 129-131)

At Mayo's trial, Bryant testified that the August 17, 1977 examination (Government's Exhibit No. 5) showed a mild hearing loss. (App. 133, L 1) She also testified that the Defendant's speech reception threshold level in August, 1977, was almost a whisper level. (App. 134) The expert was asked if a person could give such an examination in August and then give a comparable examination to one which Mayo gave in February of 1978, if he were being honest about his hearing condition in February of 1978. Her response was that "in the absence of definite trauma, no." (App. 138) She described trauma as being hit on both sides of the head by a baseball bat. She also stated that it would not be

possible for one to give the speech reception threshold responses that Mayo gave to Dr. McCoy in 1974 and then give the responses Mayo gave to Bryant in 1977. (App. 138, 139)

Dr. Ralph Nelson, Chief of Otolaryngology, at the United States Naval Hospital in Portsmouth, Virginia, was called as an expert witness to testify against the Defendant. He was the same witness who rendered testimony in the Grand Jury proceedings that led to Mayo's indictment. Nelson used the August 17, 1977 examination to show proof of near-normal hearing by Mayo after the compensation examination in September, 1974. (App. 218) Dr. Nelson later examined Mayo in February of 1978. However, in his testimony he stated that his mind was made up that the Defendant had cheated to obtain the money before he

ever examined him in February of 1978. (App. 215, 216)

The Defendant, by counsel, filed a timely Motion to Quash the Indictment or in the alternative to suppress the tainted evidence and expert opinions. The Trial Court expressed the opinion that the responses elicited from Mayo during the audiological examination were compelled.

> I know that you can compel writing samples; you can compel voice samples; I think that you can compel medical examinations requiring responses. But the question is, I suppose: When you compel them, are you supposed to tell the defendant that he is under investigation? Emphasis Added. (App. 62)

In addition thereto, the Trial Court ruled that a criminal investigation had focused on Mayo at the time that he was compelled to participate in this

audiological examination without being advised of the criminal investigative intent behind the examination.

> In addition to that, this was an ongoing investigation of a whole shipyard's practice. And the Court believes that certainly up to a point Mr. Mayo was not a target, but I don't go so far as to say, for the purposes of the record on appeal, that Mr. Mayo hadn't been pretty well zeroed in on by the time Miss Bryant made her audiological report, because she had already evaluated him, on the basis of the shipyard's records, that he was probably guilty of fraud. So, he was a target pretty much by the time she went to him, but I don't think that's the controlling issue. The controlling issue is whether or not he was, in the -- in the -- was given a routine medical examination, which would be permissible, without being asked any questions which would seek to secure a confession from him or an admission from him. All he was

> asked was for the normal medical responses to a routine medical examination. (App. 72, 73)

The Trial Court ruled that the responses elicited during the examination were merely normal medical responses to a routine medical examination, therefore admissible, to which the Defendant excepts. (App. 73)

REASONS FOR GRANTING THE WRIT

The Supreme Court of the United States has affirmed the admissibility into evidence of the results of compulsory handwriting exemplars, voice exemplars, fingerprint comparisons and blood extraction examinations. United States v. Dionisio, 410 U.S. 1 (1973); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967); Schmerber v. California, 384 U.S. 757 (1966) In the present case,

the Trial Court has expanded this body of law by stating that the results of responses to routine medical examinations are admissible despite the fact that the Defendant was compelled to give these responses to the examiner. The Trial Court's ruling was affirmed by the United States Court of Appeals for the Fourth Circuit.

This ruling is not a logical extension of the law enumerated in those opinions set forth above. On the contrary, those opinions require that Mayo's 1977 audiological examination and any expert opinion adduced thereform not be admitted into evidence against Mayo.

Each of the authorities set forth above espouse the principal that the compulsory examination of physical traits and characteristics is permissible within the perameters of the Fifth Amendment of

the Constitution of the United States. The decisions hinge on the distinction that requiring a display of purely physical characteristics does not constitute a testimonial or communicative act by the accused. A compulsory handwriting exemplar was affirmed in Gilbert so long as the exemplar was for the purpose of comparison and not to learn from the content of the exemplar.

The key to compulsory participation has been without exception that the accused is not compelled to testify against himself and that none of the evidence obtained was of a testimonial or communicative nature. In Schmerber v. State of California, 384 U.S. 757, 16 LEd. 2d 908 (1966), a blood sample was taken from an unconscious person without his consent. The court stated that Fifth Amendment privilege against

self-incrimination "relates only to testimonial or communicative acts on the part of the person to whom the privilege applies, and does not apply to acts non-communicative in nature as to the person asserting the privilege . . .". Schmerber went on to say that the protection of the Fifth Amendment against self-incrimination "reaches an accused's communications, whatever form they might take." Schmerber, 16 LEd. 2d 908 at 916.

In Wade the Defendant was required to speak. He was compelled to utter the same words purported to have been stated by a robber. The purpose of the examination was to identify the physical characteristics of his voice. "(T)he distinction to be drawn under the Fifth Amendment privilege against self-incrimination is one between an accused's 'communications' in whatever form, vocal

or physical and 'compulsion' which makes the suspect or accused the source of real or physical evidence." Wade, 388 U.S. 218, 18 LEd. 1149 at 1155.

The key to each of these "physical evidence" cases was that the defendant did not have to communicate. Communication is essential in the audiology examination.

Prosecutor Kane proffered to the Trial Court that he had considered the necessity of advising potential defendants of their constitutional rights and decided it was not necessary to do so. (App. 55)

If the audiological examination was truely a display of physical characteristics, there would have been no decision for the United States Attorney to make. Had he advised the Defendant that he was being investigated for a

possible fraud indictment or had he failed to advise the Defendant, he would have received the same display of physical characteristics. However, the Government anticipated that the validity of the test hinged upon the suspect being caught unaware. At least four times during the course of the trial of the Defendant, the Government elicited testimony from witnesses that the test required the "honest cooperation" of the Defendant. (App. 120, 128, 198, 199) Honest cooperation by the patient with the examiner must involve communication on the part of the patient.

The Government's deception caused Mayo to submit to the audiological examination. The Defendant was compelled to give testimony against himself in violation of the Fifth Amendment. This privilege protects him not only from

being compelled to make incriminatory statements, but from being compelled to be a witness against himself. Had Mayo known that he was being tested for possible criminal prosecution and still participated, he would have made a free and intelligent waiver of his Constitutional right, but the Government deprived him of this opportunity.

In the circumstances that are presented to the Court, the prosecutor evaluated the Defendant's Constitutional rights and made an errant determination. After summarily deciding the Defendant had no Constitutional rights that stood to be jeopardized, he caused the Defendant to be deceived into giving verbal and physical communications which were subsequently used against him.

The deceptive practice employed by the Government not only compelled Mayo

to incriminate himself, it deprived him of the opportunity to seek the aid of counsel. The Supreme Court of the United States has previously decided that once a defendant has been indicted for a crime, he has an absolute right to counsel from that time forward. Kirby v. Illinois, 92 S.Ct. 1877 (1972) In certain pre-indictment situations, a man also has a right to counsel if he seeks counsel.

In Schmerber, the defendant asserted that he was deprived of his right to counsel when a specimen of his blood was taken while he was unconscious after an automobile accident. The Court ruled that there was no issue concerning the right of counsel at that stage because counsel held no ability to assist the petitioner at that time. On the contrary, in the present case, Mayo's rights could have been protected by

counsel.

Hamilton v. Alabama, 368 U.S. 52 (1961) ruled that an arraignment was a critical stage of legal proceedings, and at all "critical stages" the right to counsel attaches. United States v. Wade, 388 U.S. 218 (1967) also described the Sixth Amendment right to counsel as attaching in the "critical stages" of criminal proceedings. The term "critical stage" has been defined as the point at which a substantial right would be affected. Pointer v. Texas, 380 U.S. 40 (1965).

The August 17, 1977 audiological examination was a critical stage of the criminal proceedings against the Defendant. If Mayo had known that his compulsory participation in the audiological examination was the result of a criminal investigation, he would have had the

opportunity to seek the advise of counsel. A quick review of the testing process would have shown an attorney that his client was about to be compelled to bear witness against himself. The attorney would have been in the position to render valuable advise to Mayo. Since the advise of counsel would have benefitted the Defendant, that stage would be a "critical stage" in the proceedings. By hiding the purpose of the examination, Mayo was denied his Sixth Amendment right to seek the advise of counsel.

The appropriate action for the Trial Court should have been to suppress from evidence the results of the August 17, 1977 audiological examination. The Trial Court further should have disallowed the testimony of any expert witness whose opinion could not be fully attenuated from that examination. Then,

and only then, would the Defendant receive a fair and impartial trial without the abridgment of his right to be free from being a witness against himself and his right to the assistance of counsel.

CONCLUSION

For the above-stated reasons, the Petitioner prays that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

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AFFIDAVIT

STATE OF VIRGINIA

CITY OF VIRGINIA BEACH, to-wit:

This day personally appeared before me, Deborah J. Dolenti, a Notary Public in and for the City and State aforesaid, LARRY B. SLIPOW, who being first duly sworn according to law, made oath and stated: I hereby certify that I have served three (3) copies of this Petition for Writ of Certiorari to the Fourth Circuit Court of Appeals upon all counsel of record for the Respondent, Wade H. McCree, Jr., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; Justin W. Williams, Esquire, United States Attorney, Eastern District of Virginia, P. O. Box 60, Norfolk, Virginia 23501; and John F. Kane, Esquire, Assistant United States

Attorney, Eastern District of Virginia, P. O. Box 60, Norfolk, Virginia 23501, pursuant to the requirements of Rule 33 of the Rules of the Supreme Court of the United States, by depositing same in a United States mail box, with first class postage prepaid, addressed to counsel of record for the appellee as set forth above, on or before December 7, 1979.

Larry B. Slipow

Subscribed and sworn to before me this 7th day of December, 1979.

Deborah J. Dolenti
Notary Public

My Commission Expires:

2/5/83

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-5239

United States of America,

Appellee,

versus

William Mayo,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge.

Argued October 3, 1979. Decided November 9, 1979

Before HALL and PHILLIPS, Circuit Judges and Honorable Roszel C. Thomsen, Senior United States District Judge, sitting by designation.

Larry B. Slipow for Appellant; John F. Kane, Assistant United States Attorney (Justin W. Williams, United States Attorney and Lynda L. Nersesian, Third Year Law Student on brief) for Appellee.

PER CURIAM:

William Mayo appeals his conviction for presenting false claims to the government in violation of 18 U.S.C. § 287. He raises three arguments on appeal: that the administration to him of a "pure-tone" hearing test violated his Fifth and Sixth Amendment rights; that the government did not prove by sufficient evidence that the claim he made was false when he made it; and that certain comments by the prosecutor about the "taxpayer's money" and referring to the amount of the claim so prejudiced the minds of the jury as to require reversal. Upon review of the record and consideration of the briefs of the parties and oral argument, we conclude that there is no reversible error in respect of any of the points assigned.

AFFIRMED.